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Williams, Glenys

Published in:
Northern Ireland Legal Quarterly

Publication date:
2020

Citation for published version (APA):
Williams, G. (2020). Duress and loss of control: Fear and anger in excusatory defences. *Northern Ireland Legal Quarterly*, *71*(3), 401-428. [4]. https://nilq.qub.ac.uk/index.php/nilq/article/view/311

Duress and Loss of Control: Fear and anger in excusatory defences

"Without fear we are not human."[1]

ABSTRACT

This article examines the role of the anger and fear emotions in the loss of control and duress defences and argues that, although fear is now included as a trigger in loss of control, priority is still given to anger as a triggering event. Furthermore, in duress, although fear is the overriding mental state of the duresee, it wrongly forms no part of the rationale of the defence at all.

Following a brief examination of both emotions, the paper - individually with respect to each defence - considers issues relating to the (in)sufficiency of the objective element contained in the defences, specifically because neither properly take fear into account as a characteristic which should be attributed to the reasonable person, and then, to a lesser extent, what impact theoretical principles, such as mechanistic and evaluative approaches, have on the role emotion plays in both defences (if any). It is clear that none of these, nor indeed the relatively new discipline of neuroscience, examined in the penultimate section of the paper, can tell us about the effects of emotion on decision-making, reasoning, control and responsibility, nor can they provide an answer as to how emotions - fear especially - can be properly incorporated into both defences.

Numerous emotion-based alternative solutions are disseminated, and although no preference is expressed here, it is recommended firstly, that fear should be more effectively incorporated into the loss of control defence and secondly, that duress should include fear as a characteristic attributed to the reasonable person.

I am very grateful to the reviewers for their constructive comments.

[1] J Finder *Extraordinary Powers* (Orion 1993) 346.

1 Introduction

Emotions play a vital part in all aspects of our daily lives, and indeed it is probably true to say that they have some influence - to a greater or lesser degree - on all the decisions we make about the way we live, be they trivial or life-changing.[2] It has been said that emotions 'facilitate decision making';[3] they help us to deal with problems;[4] they define our goals and values;[5] and are important to our welfare and comfort.[6] In particular, some primary emotions, such as anger and fear, which stem from our evolutionary survival instinct, play a functional[7] role in, for example, readying us to 'respond to challenges and opportunities … and providing us with information about what is important and how we are faring with respect to our goals'.[8]

The anger and fear emotions also play a part (although not always explicitly), in three criminal law defences, notably loss of control[9] (a partial defence to murder), duress (a full defence to all offences *except* murder) and self-defence (a full defence to murder). Traditionally, the anger emotion has most clearly been seen in the former provocation - now loss of control defence, albeit fear is now an additional component there. Fear is also a fundamental component in duress and self-defence.[10] As such, not only is it imperative that persons charged with criminal offences should be clear as to how these emotionally-charged

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[2] See, for example, E Y Drogin and R Marin 'Extreme Emotional Disturbance (EED), Heat of Passion, and Provocation: A Jurisdprudent Science Perspective' (2008) 36 J Psychiatry and Law 133, 139.
[3] J J Gross 'The Emerging Field of Emotion Regulation: An Integrative View' (1998) 2 (3) Review of Gen Psychology 271, 272.
[4] A H Fischer and A S R Manstead 'Social Functions of Emotion' in M Lewis, J M Haviland-Jones and L F Barrett (Eds) *Handbook of Emotions* (3rd Ed The Guilford Press 2008) 456.
[5] L C Charland 'Is Mr Spock Mentally Competent? Competence to Consent and Emotion' (1998) Philosophy, Psychiatry and Psychology 67, 73-5.
[6] D M Kahan and M C Nussbaum 'Two Conceptions of Emotion in Criminal Law' (1996) 96 (2) Columbia LR 269, 286.
[7] i.e. that emotions have developed for a specific function; A Öhman 'Fear and Anxiety', and Fischer and Manstead, both in *Handbook of Emotions* (n 4) 710 and 456 respectively.
[8] Gross (n 3) 'conclusions'.
[9] Although Herring rightly writes that while the traditional focus was on anger, 'there is … nothing in the requirements of loss of control that requires the defendant to be acting out of anger'. J Herring *Criminal Law. Text, Cases and Materials* (8th Ed Oxford University Press 2018) 230.
[10] A Reilly 'The Heart of the Matter: Emotion in Criminal Defences' (1997-8) 29 Ottawa LR 117, 141.

defences apply, it is also important for all manner of social, political and legal reasons that the way in which the emotional elements therein are interpreted should be both transparent and consistent. Yet, although the law and emotion debate has been evident for the last 20 years,[11] it will be seen that there are still no firm answers which provide the criminal law with a coherent understanding of the emotions which not only underlie these defences, but which also govern the way in which individuals behave.

To begin with then, this article will briefly clarify what emotions are, and what features pertain to the fear and anger emotions particularly, before going on to look at the loss of control and duress defences. While it is appreciated that there are clear differences between the two, which it could be argued would thus warrant a different approach, these two are selected for a number of reasons: Firstly, they are generally considered to be excusatory, while self-defence is traditionally considered to be justificatory.[12] This - together with the absence of a need for proportionality in loss of control and duress - are the main reasons why self-defence will not be discussed further here. Also, as both loss of control and duress adopt an objective test which specifically imbues what was in the past described as the 'reasonable man' with a defendant's characteristics, a person's typical reaction to fear or anger is a characteristic which should thus, ostensibly at least, be taken into account. Thirdly, both loss of control and duress specifically look to 'circumstances' - especially that a fear of serious

[11] P G Nestor 'In Defense of Free Will: Neuroscience and Criminal Responsibility' (2019) 65 International Journal of Law and Psychiatry 1, 1. See, for example, S A Bandes (Ed) *The Passions of Law* (New York University Press 1999); R Grossi 'Understanding Law and Emotion' (2015) 7 (1) Emotion Review 55; K Abrams and H Keren 'Who's Afraid of Law and the Emotions?' (2009-10) 94 Minnesota LR 1997; H Petersen 'The Language of Emotions in the Language of Law' in H Petersen (Ed) *Love and Law in Europe* (Dartmouth Pub. Co. 1998); C Sanger 'Legislating with Affect: Emotion and Legislative Law Making' in J E Fleming (Ed) *Passions and Emotions* (New York University Press 2013).

[12] See, for example, G Williams 'The Theory of Excuses' [1982] Crim LR 732, 734 and J Horder 'On the Irrelevance of Motive in Criminal Law' in J Horder (Ed) *Oxford Essays in Jurisprudence* (4th series Oxford University Press 2000). However, this is not universally agreed. See for example, LC No. 304 *Murder, Manslaughter and Infanticide* (2006) [6.61] with regard to duress; J Dressler 'Rethinking Heat of Passion: A Defense in Search of a Rationale' (1982) 73 (2) The J of Criminal Law and Criminology 421, 448 with regard to provocation (as it then was) and R A Duff 'Criminal Responsibility and Emotions: If Fear and Anger can Exculpate, Why not Compassion?' (2015) 58 (2) Journal of Philosophy 189.

violence exists - to provide an explanation of the perpetrator's conduct. Next, and as will be discussed below, both duress and loss of control are 'concessions to human frailty'.[13] Sixth, they both involve an element of loss of control - a specific requirement in the loss of control partial defence, and in the case of duress, a loss of control by the defendant as a result of the pressure imposed by the duressor.[14] Finally, as the main aim of this article is to highlight the lack of regard given to the fear emotion, loss of control best demonstrates that although fear of serious violence is now a triggering factor in loss of control, priority is still, as it always has been, given to the anger emotion,[15] whereas examining duress shows that although fear is the overriding mental state of someone who is claiming duress,[16] it ironically forms no part of its rationale at all.[17]

Following the brief exposition of the fear and anger emotions, the paper moves on to examine loss of control and while acknowledging the role of characteristics and emotions in this partial defence, contends that anger - its traditional basis - takes precedence over the fear trigger, which is not given the priority it deserves.

The subsequent discussion of duress and its relevant characteristics shows that fear - its key component - is not taken onto account at all. In respect of both defences, this raises the

[13] See for example, K J Arenson 'The Paradox of Disallowing Duress as a Defence to Murder' (2014) 78 (1) JCL 65, 71; and see for example the Irish Law Commission referred to in E Spain *The Role of Emotions in Criminal Law Defences* (Cambridge University Press 2011) 186 and Lord Hailsham *R v Howe* [1987] 1 AC 417, 432. Or as the Law Commission has said: it is a 'recognition of the infirmity of human nature'. LC Working Paper No.55 *Codification of the Criminal Law. General Principles. Defences of General Application* (1974) [25].

[14] The essence of duress is that '"pressure" or duress exerted upon a party in terms of threats [amounts to] submission …' J A Scutt 'Consent versus Submission: Threats and the element of fear in Rape' [1977] 13 (1) University of Western Australia LR 52. This is borne out by a definition of submission as being 'a state in which people can no longer do what they want to do because they have been brought under the control of someone else'. *Collins English Dictionary.*

[15] See, for example, M J Allen 'Provocation's Reasonable Man: A Plea for Self-Control' (2000*)* JCL 64 (2) 216, 239; and A Clough 'Mercy Killing: Three's a Crowd?' (2015) JCL 358, 359.

[16] Spain (n 13) 67, quoting Yeo.

[17] E Spain 'Duress and Necessity in Ireland: Reform on the Horizon' (2008) 18 (3) Irish Crim LJ 70, 71. See also *Simester and Sullivan's Criminal Law. Theory and Doctrine* (7th Ed Hart Publishing 2019) 753.

question of the significance of the objective element and, to a lesser extent, the usefulness of both choice and/or character theory. What none of these do is to explain whether the perpetrator was capable of controlling her behaviour or of resisting the threat, or whether she simply chose not to exercise that capacity.

One way in which it could be possible to ascertain this is via the relatively new discipline of neuroscience, which forms the penultimate section of this paper. While there will be a brief overview of some of the more recent emotion theories,[18] 'neurolaw',[19] the new 'rapidly developing area of interdisciplinary research on the meaning and implications of neuroscience for the law and legal practices'[20] will be analysed to ascertain if it is able to provide a means of explaining the impact these emotions have on cognitive decision-making and reasoning, and on a person's ability to exercise self-control (or not) or to demonstrate courage (or not), in the face of very strong emotions.

The conclusion reiterates that fear should be more effectively incorporated into the loss of control partial defence and should be a specific component of the duress defence. Some recommendations for emotion-based alternatives are highlighted in the conclusion.

2 Defining emotion[21]

[18] So not, for example, William James; Decartes: Freud. For more details on these, see, D Keltner, K Oatley and J M Jenkins *Understanding Emotions* (3rd Ed John Wiley and Sons MA 2014); and W Lyons *Emotion* (Cambridge University Press 1980). A good summary of the various theories of emotion, and bibliography relating thereto can be found at: http://plato.stanford.edu/entries/emotion/ (accessed on 6 November 2018).

[19] See W Glannon 'Neuroscience, Law, and Ethics' (2019) 65 International Journal of Law and Psychiatry 1, (a Special Issue containing a number of articles on law and neuroscience); and O D Jones, R Marois and others 'Law and Neuroscience' (2013) 33 (45) 17 Journal of Neuroscience 624.

[20] G Meynen 'Neurolaw: Neuroscience, Ethics and Law. Review Essay' (2014) 17 Ethical Theory and Moral Practice 819, *abstract*.

[21] There are over 100 emotions listed at www.curriculumpress.edu.au/soi/downloads/TLI9_A-Z_Emotions.doc (accessed 19 March 2014).

The word emotion is based on the Latin *emovere*, (*e* meaning 'out' and *movere* meaning 'move'). The related term 'motivation' is also derived from *movere.* In effect, there is a strong link between motive and emotion, as emotions are seen to 'motivate behaviour'.[22]

A dictionary definition describes emotion as 'a strong feeling deriving from one's circumstances, mood or relationship with others; instinctive or intuitive feeling as distinguished from reasoning or knowledge'.[23] However there is in reality a general perception among emotion theorists that it is not possible to advance a coherent definition of emotion,[24] not least because it has such 'fuzzy boundaries',[25] and covers such a broad range of experiences. As Svendsen has explained: '"Emotion" is a term that can cover a range of highly dissimilar phenomena - from pain, hunger and thirst to pride, envy and love, from the almost purely physiological to the almost completely cognitive'.[26]

Despite this ambivalence, there is partial concurrence that emotions can be divided into certain categories. Although there is no agreement as to an exact figure,[27] it has been claimed that there are six primary 'innate',[28] basic or 'simple'[29] emotions. These are 'happiness,

[22] Kahan and Nussbaum (n 6) 297. See the claimed re-emergence of the motive-emotion link in R M Ryan '*Motivation and Emotion*: A New Look and Approach to Two Reemerging Fields' (2007) 31 Motivation and Emotion 1.
[23] http://www.oxforddictionaries.com (accessed 6 November 2018). This is interesting for two reasons. Firstly, because emotion and instinct are two distinct concepts: see C Sanger 'The Role and Reality of Emotions in Law' (2001-2) 8 William and Mary J of Women and the Law 107, 108. Secondly, because of the assumption in the definition that emotion is separate from reasoning.
[24] See for example, J Hillman *Emotion. A Comprehensive Phenomenology of Theories and their Meaning for Therap*y (Routledge and Kegan Paul 1960) 243; and R C Solomon 'The Philosophy of Emotions' in *Handbook of Emotions* (n 4) 4.
[25] J J Gross 'Emotion Regulation in *Handbook of Emotions ibid,* 498.
[26] L Svendsen *A Philosophy of Fear* (Reaktion Books 2008) 21.
[27] D Evans, *Emotion: The Science of Sentiment* (Oxford University Press 2001) 6. Svendsen notes that '[i]n an overview of fourteen lists of "basic emotions" it is striking that there is not one single emotion that is included in all lists' *ibid,* 22.
[28] S Uniacke 'Emotional Excuses' (2007) 26 (1) Law and Philosophy 95, 99.
[29] J Bourke *Fear. A Cultural History* (Virago Press 2005) 8.

sadness, fear, anger, surprise, [and] disgust'.[30] It is argued by some that we can have very little control over these, because our reactions to them are both reflexive and instinctive.[31]

There are also purported secondary, 'complex',[32] 'developed'[33] or social emotions, such as embarrassment, love, shame, envy, guilt, pride, jealousy, awe and horror. These have also been described as 'higher cognitive emotions'[34] because they involve more reflection than the supposedly automatic primary emotions and as such, are more liable to be swayed by our thoughts. Moreover, these take more time to develop and to recede than the primary emotions.[35] Of interest here is that a number of the secondary emotions seem to derive from the primary passions. For example, jealousy, awe, and horror, all include features of fear,[36] while guilt, pride, envy and shame all contain elements of disgust.

Finally, a third category of *'background'* emotions, comprises emotions such as 'well-being or malaise, calm or tension'.[37] Although similar to moods, the latter last for longer than emotions; they operate in a moderate, as opposed to intense ambience and are 'objectless, free- floating'.[38] Contrarily, emotions tend to endure for only a short time and always have an intentional object;[39] 'they are always about something or other. One is always angry about something … one is always afraid of something'.[40] If there was no object, there would be no

[30] A Damasio *The Feeling of What Happens: Body, Emotion and the Making of Consciousness* (Vintage 2000) 50.
[31] See, for example, J Le Doux *The Emotional Brain. The Mysterious Underpinnings of Emotional Life* (Phoenix 1998) 19; and Evans (n 27) 16.
[32] Bourke (n 29) 8.
[33] Uniacke (n 28) 99.
[34] Or even 'self-conscious emotions' A A Baird 'The Developmental Neuroscience of Criminal Behavior' in N.A.Farahany (Ed) *The Impact of Behavioral Sciences on Criminal Law* (Oxford University Press 2009) 95.
[35] Evans (n 27) 28-9.
[36] Bourke (n 29) 8.
[37] Damasio (n 30) 51. Italics in original.
[38] Keltner, Oatley and Jenkins (n 18) 28.
[39] As compared to moods; R S Lazarus *Emotion and Adaptation* (Oxford University Press 1991) 48.
[40] Solomon (n 24) 12.

reason to be either fearful[41] or angry.[42] As a result, there is available to us an underlying reason for responding to the emotion; there is a causal incentive to explain why the defendant acted in the way he did which is open to evaluation and as to its reasonableness or unreasonableness.[43]

This 'evaluative' view is one favoured by Kahan and Nussbaum[44] in their seminal article on two opposing approaches to emotions, the mechanistic and the evaluative.[45] The former refers to situations of impulse which are lacking in thought or cognition, deriving 'from an innate human nature' which impel a person to act impulsively.[46] Contrarily, the evaluative view is associated with a cognitive appraisal of events which are open to evaluation. This holds that emotions (i) possess within them an assessment or appraisal of the importance or significance of objects and events such that actors can themselves evaluate the appropriateness of their emotion and their resulting actions;[47] and also, by implication (ii) that they 'can themselves *be* evaluated' by others for their appropriateness or inappropriateness[48] by judging cases of loss of control and duress alongside the way those emotions are typically expressed.[49] Therefore, while the evaluative view 'can appraise the evaluations internal to the offender's

[41] Svendsen (n 26) 35.
[42] S Gough 'Taking the Heat out of Provocation' (1999) OJLS 19 (3) 481, 489.
[43] J Gardner The Logic of Excuses and the Rationality of Emotions' (2009) 43 (3) J of Value Inquiry 1, 42.
[44] Kahan and Nussbaum (n 6).
[45] Legal theory is very sparse as most of the vast literature is mainly of a physiological, biological, psychological and psychoanalytic nature, as evidenced in the writings of for example, Rorty, Le Doux and de Sousa.
[46] Kahan and Nussbaum (n 6) 273 and 277-9. Mackay and Mitchell suggest that 'the reality lies somewhere in between' the evaluative and mechanistic view; R D Mackay and B J Mitchell 'But is this Provocation? Some Thoughts on the Law Commission's Report on Partial Defences to Murder' [2005] Crim LR 44, 49. Having said that, research does show that even the more mechanistic/impulsive emotions do involve an element of subconscious processing. As Davies has said: 'despite our convictions that we consciously control our actions … [they] are in fact caused by lower level brain processes of which we have little or no awareness…' P S Davies 'Skepticism Concerning Human Agency: Sciences of the Self Versus Voluntariness in the Law' in N.A.Vincent (Ed) *Neuroscience and Legal Responsibility* (Oxford University Press 2013). See also J Le Doux 'Coming to Terms with Fear' (2014) 111 (8) Proc Natl Acad Sci USA 2871, and text to (n 197, n 198 and n 219) below.
[47] i.e. that a 'subject's own evaluations of her situation were an essential part of her emotions …' Kahan and Nussbaum (n 6) 286 and 291.
[48] *ibid*, 286-287. Emphasis in original.
[49] V Tadros 'The Characters of Excuse' (2001) 21 (3) OJLS 495, 500.

emotions as reasonable or not reasonable', the mechanistic view simply permits an inquiry into how resilient some emotions are.[50] In arguing that there is a cognitive element in virtually all emotions - including anger and fear - and that these are thus open to evaluation,[51] Kahan and Nussbaum have set the scene for the currently dominant evaluative/cognitive view.[52]

2.1 What is fear? [53]

Fear, 'an inevitable part of human existence',[54] is generally described as 'an emotional reaction resulting from the apprehension that there is a danger about and the consequent desire to avoid or be rid of the danger'.[55] It is a survival mechanism, designed to motivate behaviour to reduce any threats,[56] and, as one of the earliest existing emotions, has possibly been around for some 500 million years.[57] Consequently, we know more about this emotion than any other.[58]

Physically and physiologically while in a state of fear, muscles tense up, the eyes widen and the body perspires, yet is cool; both the heart rate and heartbeat accelerate. Some people may shake, run away, scream, jump, or simply curl up[59] and remain immobilized by the emotion.

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[50] Kahan and Nussbaum (n 6) 359-361. Compare Berger on what he calls 'normative veiling' i.e. simply saying that a person's will is overcome by emotion veils 'the normative quality of the emotions that inform the decisions that people make' and that they should, accordingly, be evaluated, B L Berger 'Emotions and the Veil of Voluntarism: The Loss of Judgment in Canadian Criminal Defences' (2005-6) 51 McGill LJ 99, 128.
[51] Kahan and Nussbaum *ibid* 295.
[52] See, for example, LC No.290 *Report on Partial Defences to Murder* (2004) [3.39].
[53] According to Campbell, the '5 types of fear [are] (social; agoraphobic; death and illness; sexual and aggressive scenes; and harmless animals') A Campbell 'Sex Differences in Direct Aggression: What are the Psychological Mediators?' (2006) 11(3) Aggression and Violent Behavior 237, 242.
[54] Öhman (n 7) 709.
[55] Lyons (n 18) 70.
[56] Öhman (n 7) 710.
[57] Evans (n 27) 44.
[58] J Le Doux, *Synaptic Self* (Viking Penguin 2002) 212. Le Doux also claims that '[w]e have English words to distinguish more than three dozen variants of fear-related experiences'; Le Doux (n46).
[59] Hillman (n 24) 126; but see for example, D H Barlow, B F Chorpita and J Turovsky 'Fear, Panic, Anxiety and Disorders of Emotion' in D A Hope (Ed) Perspectives on Anxiety, Panic and Fear Vol 43 of the *Nebraska Symposium on Motivation* (Nebraska Press 1996) 289.

Indeed, usually, the automatic response to fear is to freeze.[60] In Galenic terms, this emotion is blue and cold.[61]

2. 2 What is anger?

Anger has been defined as 'a strong feeling of annoyance, displeasure, or hostility';[62] 'a feeling of great annoyance or antagonism as the result of some real or supposed grievance'.[63] However, this does not really convey the potential severity of anger reactions in loss of control situations especially; indeed, this is better conveyed in its synonyms, which suggest a greater level of anger, described in terms of rage, wrath, outrage and fury.[64]

When angry, one's violent propensities are heightened and concern about one's potential victim tends to diminish.[65] A person can be stronger, more aware and more forceful[66] when angry. 'The blood "boils", the face becomes hot, the muscles tense. There is a feeling of power and an impulse to strike out, to attack the source of anger … There is a strong feeling of impulsiveness and the "dimension of control" is lower than for any other emotion'.[67] In contrast to fear, the usual response to anger is to fight.[68] In Galenic terms, this emotion is red and hot.

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[60] Le Doux (n 31) 176.
[61] '(Medicine) of or relating to Galen (Latin name *Claudius Galenus* ?130-?200 AD), the Greek physician, anatomist, and physiologist, or his teachings or methods'; found at http://www.thefreedictionary.com/Galenic (accessed 6 November 2018).
[62] http://www.oxforddictionaries.com (accessed 6 November 2018).
[63] http://www.collinsdictionary.com (accessed 6 November 2018).
[64] http://www.oxforddictionaries.com (accessed 6 November 2018). On anger and degrees of anger generally see J Horder *Provocation and Responsibility* (Clarendon Press 1992), and Dressler (n 12) 465.
[65] R Brandt 'A Motivational Theory of Excuses in the Criminal Law in M L Corrado (Ed) *Justification and Excuse in the Criminal Law. A Collection of Essays* (Garland Pub. Inc.1994) 114.
[66] E A Posner 'Law and the Emotions' (WP 103) University of Chicago 5.
[67] Reilly (n 10) 133, quoting Izard.
[68] Gough (n 42) 487.

Contrasting the two emotions further, while it has been argued that 'anger … can be an ethically appropriate emotion and that … it may be a sign of moral weakness or human coldness *not* to feel anger',[69] the mainstream view is that anger is perceived to be an inappropriate or 'bad' emotion;[70] it is not usually perceived to be commendable, nor is it an emotion that we would want to encourage.[71] Illustrating this and writing about loss of control specifically, Simester and Sullivan have observed that '… anger is a criminogenic emotion and one of the key deterrent tasks of the criminal law is to provide incentives for citizens to curb violent responses induced by their angry states'.[72]

On the other hand, the fear emotion has been said to be 'understandable … admirable',[73] 'appropriate and justified'.[74] It has been said that an emotion can be 'appropriate' where the reason for it is a good reason. As Charland illustrates, if a person came across a big bear in the forest, this would be a good reason for fear to be explained as both a cogent and fitting response.[75] Thus, acting to save oneself in such a situation would be 'a good reason to act which ought not to be ignored'.[76] In contrast, a 'petty affront' would not be sufficient.[77] This is reiterated in *R v Dawes*, where Lord Judge CJ said that 'unless the circumstances are extremely grave, normal irritation, or even serious anger, do not often cross the threshold into loss of control'.[78]

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[69] i.e. righteous anger. LC No. 290 *Report on Partial Defences to Murder* 2004 [3.38]. Emphasis added.
[70] See generally B Rosebury 'On Punishing Emotions' (2003) 16 (1) Ratio Juris 37.
[71] E Spain 'Love in Life and Death' (2013) 64 (1) NILQ 91, 106.
[72] Simester and Sullivan (n 17) 411. Thus raising the broader question of whether *any* defence based on anger or loss of control is acceptable; for example, Horder, referring to the then provocation defence, asked 'whether [any] actions in anger are worthy of excuse'. J.Horder 'Assisting in Suicide. Keeping the Debate Alive' (1990) 54 (1) JCL 253 at 255. Also see Horder (n 64). Thanks go to a reviewer for raising this broader point.
[73] J Horder 'Cognition, Emotion, and Criminal Culpability' (1990) LQR 469, 480. Uniacke has said that fear is a proper and fitting sort of emotional reaction to allow an excusatory defence; Uniacke (n 28) 101.
[74] A Norrie 'The Coroners and Justice Act 2009 - Partial defences to Murder (1) Loss of Control' [2010] Crim LR 275, 278.
[75] Charland (n 5) 77.
[76] Reilly (n 10) 145.
[77] *Per* Lord Millett in *R v Smith (Morgan)* [2001] 1 AC 146, 214.
[78] *R v Dawes* [2013] EWCA Crim 322 [60].

What we can see here then is that appropriateness is linked with the reasons for acting (taking us back to the link with motive) and that not only must the emotion itself be appropriate, but also that a person's *response* or reaction to it must also be appropriate. Uniacke explains that

> … an emotional response is of a morally appropriate type if a morally well-disposed person would be justified in having that type of response to the particular circumstances ... A morally appropriate type of response could be one that we would be right to feel in particular circumstances, such that it would be morally inappropriate were we to feel otherwise.[79]

Thus, while fear would be an appropriate response in situations of abuse especially, a response made in anger may *not* be appropriate. For example, Holton and Shute writing about the previous provocation defence said that '[i]t is one thing to get angry; it is another to lose one's self-control … Perhaps it is justifiable to become angry in the face of provocation. But is it justifiable to lose one's self-control? We think not'.[80] In the same vein, Norrie, agreeing with the Law Commission, wrote that 'anger cannot justify outright a violent response, certainly not a killing'.[81]

Despite these clear differences in our perception of the two emotions and our reactions to them, it should be noted that they do nonetheless have some common features. For example, the impulse, or instinct, of self-preservation is a central feature of both emotions;[82] in an

[79] 'Lack of pity, for instance, would be callous or grossly insensitive in some circumstances'; Uniacke (n 28) 100.
[80] R Holton and S Shute 'Self-control in the Modern Provocation Defence' (2007) 27 (1) OJLS 49, 70.
[81] A Norrie *Crime Reason and History* (3rd Ed Cambridge University Press 2014) 312 and LC No. 173 LCCP *Partial Defences to Murder* (2003) [4.165].
[82] Posner (n 66) 16.

anger situation fighting, or other like hostile behaviour can be seen as key to survival,[83] as acting in duress is, if the individual's life is threatened.[84] In addition, they are both primary (and negative) emotions the responses to which may, to a degree, be reflexive, instinctive and reactive.[85]

3 The loss of control partial defence

In a series of papers in 2003,[86] 2004[87] and 2006,[88] the Law Commission reviewed the law on provocation and excessive use of force in self-defence, (the latter in the context of providing a defence which did not discriminate against women who killed abusive partners, as provocation was deemed to do). In particular, and following criticism of the emphasis on anger as its focal point, it noted in its 2003 Consultation Paper, *Partial Defences to Murder*, that '[t]he defence of provocation elevates the emotion of sudden anger above the emotions of fear, despair, compassion and empathy, [and asked itself whether it was] morally sustainable for … anger to found a partial defence to murder'. In response, it concluded that there was an argument that it was not.[89] Furthermore, the Law Commission had also recommended that the need for a loss of control be dispensed with,[90] but this was rejected following consultation - and indeed, the nomenclature of loss of control replaced the provocation label.

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[83] Lyons (n 18) 41.
[84] For example, the Law Commission said 'The law must recognize that the instinct and perhaps the duty of self-preservation is powerful and natural …' LC No. 304 *Murder, Manslaughter and Infanticide* (2006) [6.64].
[85] See, for example, R G Fontaine 'The Wrongfulness of Wrongly interpreting Wrongfulness: Provocation Interpretational Bias and Heat of Passion Homicide' 79. http://works.bepress.com/reid_fontaine/11/ (accessed 6 November 2018).
[86] LCCP No.173 *Partial Defences to Murder* (2003).
[87] LC No. 290 *Report on Partial Defences to Murder* (2004), and indeed in LCCP No.177 *A New Homicide Act for England and Wales?* (2005).
[88] LC No. 304 *Murder, Manslaughter and Infanticide* (2006).
[89] LCCP No.173 *Partial Defences to Murder* (2003) [4.164].
[90] LC No. 290 *Report on Partial Defences to Murder* (2004) [1.13]. See, for example, B Mitchell 'Loss of Self-control Under the Criminal Justice Act 2009: Oh No!' in A Reed and M Bohlander (Eds) *Loss of Control and Diminished Responsibility. Domestic, Comparative and International Perspectives* (Ashgate Pub. Ltd 2011) 50.

With these issues in mind, the Government subsequently acknowledged that ignoring the impact of fear in provocation was problematic and as a result, the defence now contains a new 'fear of serious violence' 'trigger', although the Ministry of Justice itself conceded that 'it is not helpful for killings which are triggered primarily by fear to be shoehorned into a partial defence which is aimed at killings triggered by anger'.[91]

The provisions are contained in sections 54 and 55 Coroners and Justice Act 2009, which state that:

> s54 "(1) Where a person ("D") kills or is a party to the killing of another ("V"), D is not to be convicted of murder if –
>
> (a) D's acts and omissions in doing or being a party to the killing resulted from the D's loss of self-control,
>
> (b) the loss of self-control had a qualifying trigger, and
>
> (c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D …[92]
>
> s55 "(2) A loss of control had a qualifying trigger if subsection (3), (4) or (5) applies.
>
> (3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.
>
> (4) This subsection applies if D's loss of self-control was attributable to a thing or things done or said (or both) which –

[91] Ministry of Justice CP19/08 *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law* (2008) [27].

[92] S54 (2) and (3) continue: "2) For the purposes of subsection (1) (a), it does not matter whether or not the loss of control was sudden.
(3) In subsection (1) (c) the reference to "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint."

(a) constituted circumstances of an extremely grave character, and

(b) caused D to have a justifiable sense of being seriously wronged …"

The Ministry of Justice explained that

> 'Whichever of these qualifying triggers applies, a number of factors must be present for the defence to succeed.
>
> The first is that a person with certain characteristics might have acted in the same or similar way to the defendant. These characteristics are that: (i) they were of the same sex and age as the defendant; (ii) they had an ordinary level of tolerance and self-restraint; and (iii) they were in the same circumstances of the defendant …'[93]

3. 1 Emotions and character(istics) in loss of control

As can be seen then, the relevant characteristics to be ascribed in loss of control are sex and age, tolerance and self-restraint,[94] and circumstances.[95] However, this is slightly misleading, because for the purposes of the objective test, it must be noted that whereas a defendant's characteristics can be ascribed for the purposes of the gravity of the provocation, only age and gender - and no other characteristics - can be ascribed to the defendant's capacity for control.[96]

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[93] Ministry of Justice Circular 2010/13 'Partial defences to murder: Loss of control and diminished responsibility; and infanticide. Implementation of Sections 52, 54 to 57 of the Coroners and Justice Act 2009' (4 October 2010) [16] and [17].

[94] The allusion to self-restraint recognizes that there is an expectation that people will exercise self-control. Herring (n 9) 240. Loss of control does not have to be absolute; see, for example, Lord Diplock in *Phillips v The Queen* [1969] 2 AC 130 cited in LC No. 290 *Report on Partial Defences to Murder* (2004) [3.27] on 'degrees' of control.

[95] On circumstances especially, see C Withey 'Loss of Control, Loss of Opportunity?' [2011] Crim LR 263, 273-4.

[96] The same applied in the old provocation defence: *AG for Jersey v Holley* [2005] UKPC 23.

This distinction has been criticised most especially by Yeo on the basis that the rationale for the defence, and the rationale for the objective test are two different things. According to Yeo, the rationale for the defence 'may be seen as the law's concession to human frailty…' [or] 'that the accused was not fully in control of her or his behaviour when the homicide was committed'. However, the rationale for the objective test is 'the perceived need "for society to maintain objective standards of behaviour for the protection of human life"'. As such, the objective test rationale

> bears no conceivable relationship with the underlying rationale of the defence [which do not] require the distinction to be made between characteristics of the accused affecting the gravity of the provocation from those concerned with the power of self-control.[97]

It is a truism to say that the capacity for exercising self-control obviously differs as between different people, and while for example, anger/fear management training[98] or emotion regulation[99] can be effective in training some individuals[100] to control their emotions,[101] some

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[97] S Yeo 'Power of Self-control in Provocation and Automatism' (1992) 14 Sydney LR 3, 4 and 8.

[98] These consist of 'behavioral, cognitive, attentional, physiological, or emotional strategies to eliminate, maintain, or change emotional experience and/or expression'. L R Brody and J A Hall 'Gender and Emotion in Context' in *Handbook of Emotions* (n 4) 400.

[99] 'Emotion regulation studies how individuals influence which emotions they have, when they have them, and how they experience and express them'. Gross (n 3) *abstract.*

[100] Such as, say, police officers; firemen and soldiers. See for example, M Baron 'Excuses, Excuses'(2007) 1 Crim Law and Philosophy 21, 23; See generally (2004) 17 (1) Social Research: An international Quarterly of the Social Sciences (special 'Courage' issue); H V Hall 'Extreme Emotion' (1990) 12 U Hawaii L Rev 39; and M D Bayles 'Reconceptualising Necessity and Duress' in Corrado (n 65) 449. Grossman describes the 'conditioning' enforced on soldiers before going into battle, while Rachman uses bomb disposal experts (and astronauts) as examples of this; D Grossman *On Killing. The Psychological Cost of Learning to kill in War and Society* (Little, Brown and Co. 1995); S J Rachman 'Fear and Courage: A Psychological Perspective' in Courage issue 158-9. See also Morse's list of 'variables' that assist us in maintaining control; S J Morse 'Culpability and Control' (1993-4) 142 U Pa L Rev 1587, 1605-1610.

[101] See, for example, Morse *ibid*. In effect, this suggests that we are not talking about the emotion itself, but rather, a person's reaction to it. See text to (n 79) above. As Reilly has said, '[a]lthough actors might have no control over the arousal of emotion, they have a significant level of control over how to deal with the feelings invoked. The translation of anger into aggression is a matter of choice' (n 10) 133. Compare J Sabini and M Silver 'Emotions, Responsibility and Character' in F Schoeman, *Responsibility, Character and the Emotions* (Cambridge University Press 1987) 169 (summarising Kant's view on emotions). On controlling emotions, see,

people will still be prone to reacting more aggressively than others.[102] This is no doubt one reason why characteristics cannot be ascribed to the person with a normal degree of tolerance and self-restraint in relation to the capacity for control, but does this mean that an inability to control oneself because one is angry, is (or is not) a reflection of one's character?[103]

On the one hand Reilly has said that an angry reaction *does* reveal a person's character, because '[t]he person of good character has control over his or her emotional reactions …'[104] while on the other hand, character theory tells us that even though the defendant was acting unlawfully, this was not a reflection of her character.[105] Tadros explains that this is because, in relying on reasons which are different to those that would normally motivate her, the actor is acting in a way which is distinct from her normal behaviour:

> Her character while she is in a state of extreme anger is not like her character whilst calm … But … this is so only if the settled character of the agent is peaceful. If it is not, then she cannot show the difference between her settled character and her outraged character that provides the basis of the defence.[106]

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for example, Holton and Shute (n 80), and 'The Art of Self-Control' at http://www.svpvril.com/Ingalese/ingalese4.html (accessed 6 November 2018).

[102] B Mitchell 'Provoked Violence, Capacity and Criminal responsibility' (1995) 1 Psychology, Crime and Law 291, 296.

[103] J T Parry 'The Virtue of Necessity: Reshaping Culpability and the Rule of Law' (1999) 36 Houst LR 397, 423-6. G Williams 'Necessity: Duress of Circumstances or Moral Involuntariness?' (2014) 43 1 Common Law World Review 1, 23.

[104] Reilly (n 10) 132. N Levy and T Bayne 'A Will of One's Own: Consciousness, Control and Character' (2004) 27 International Journal of Law and Psychiatry 459, 468: 'it will remain true that some individuals will have less will power than others do through no fault of their own'.

[105] Tadros notes this (n 49) 495.

[106] Tadros *ibid*, 507 and more generally in *Criminal Responsibility* (Oxford University Press 2007), Chapter 11.

This points towards some interesting philosophies about the effect of emotion on loss of control,[107] whereby it is argued that the provoked person is still capable of reasoning,[108] but her perspective is changed such that she prioritises reasons for action that would normally have remained marginal, rather than relying on reasons that would usually influence her. Posner best explains this as follows:

> Emotions … have a certain feel or affect characterized usually by a focus on particular stimulus with the result that the rest of the environment "fades" (a little or a lot, depending on the strength of the emotion) … [During the emotion state] people continue to act rationally [albeit] differently from the way they do in the calm state … people experience … temporary variations in their preferences, abilities, and/or beliefs.
>
> Their preferences change so that what psychologists call the "action tendency" of an emotion becomes relatively attractive. The action tendency of anger is to strike out; so we can say that a person, while angry, develops a temporary preference to strike the person who offends him … a person in an emotional state does not act irrationally given his temporary preferences … [in contrast] fear produces flight from a threat.[109]

It can be seen then that there is a disparity between the anger and fear reactions, and that the latter is not a reaction customarily associated with losing self-control.[110] In line with the typical responses to anger and fear noted earlier, the former characteristically manifests itself as a violent expression of rage, whereas the latter 'might be characterised by very different

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[107] By, for example, Gough (n 42) 481 and 488, and G Mousourakis 'Emotion, Choice and the Rationale of the Provocation Defence' (1999) 30 Cambrian LR 21, 23.
[108] In *R v Jewell* the Court of Appeal accepted that loss of control meant 'a loss of *normal* powers of reasoning' [2014] EWCA Crim 414 [23]; Emphasis added.
[109] Posner (n 66) 3-5. Compare Holton and Shute (n 80) 52 and 55: 'What is lost when one loses self-control is control over *which* mental elements [and 'immediate inclinations'] drive one's actions'.
[110] Mitchell (n 90) 47.

external signs which are not easily detectable: typically a state of paralysis and submission'[111] or as noted by Posner, a flight reaction, none of which relate to the notion of loss of control.

This therefore speaks directly to the question as to whether it was necessary to keep the loss of control requirement in the defence. When the Law Commission recommended dispensing with it, Mackay and Mitchell argued that the loss of control prerequisite went to the very heart of the defence, because it had to be caused by 'extreme emotional disturbance' on the defendant's part. Abolishing loss of control would thus ignore the defendant's mental condition in a situation where it was precisely that which caused him to lose his self-control in the first place.[112]

Contrarily however, and agreeing with the Law Commission, Carline noted that:

> [t]he essence of the defence is fear and thus the law should not also require the defendant to suffer a loss of self control … If the Government consider that it is important to abolish the word 'provocation' because of its negative connotations it is difficult to understand why the same does not apply to the phrase loss of self control, which connotes anger as opposed to fear and desperation.[113]

This must be right. If we are saying that loss of control is an emotion-based defence and that allowances are given for reactions carried out as a result of emotions felt at the time the offence was committed, then why the need for an additional requirement in the form of loss of control which does not 'fit' with the fear emotion? The Government's explanation that it needed to be retained in order to prevent its use in cold-blooded killings is fair enough, but

[111] Reilly (n 10) 137.
[112] Mackay and Mitchell (n 46) 47.
[113] A Carline 'Reforming Provocation; Perspectives from the Law Commission and the Government' [2009] 2 *Web JCLI*; http://webjcli.ncl.ac.uk/2009/issue2/carline2.html

this does prioritise that one form of killing at the expense of others, such as those committed as a result of domestic violence for example, which could legitimately be claimed on an emotional rationale,[114] a rationale the Government clearly wanted to avoid.

However, that criticism aside, and despite its welcome inclusion in the partial defence, it is also clear for other reasons that the fear trigger does not have the force of anger in loss of control.

Firstly, the conditions for satisfying the triggers are unequal. This is made evident by Susan Edwards who explains that

> Fear … is only a necessary condition, it is not a sufficient condition and is qualified not by "extremely grave circumstances", as is the anger defence, but specifically by the fear of "serious violence" … so … the evidential requirement is more stringent and more specific than the anger qualifying trigger … The state of anger must follow on from extremely grave circumstances whilst the state of fear must flow from serious violence. In addition, extremely grave circumstances can include any circumstances, whilst there is one precondition to the fear defence, that of "serious violence".[115]

Secondly, the fear-loss of control trigger incorporates excessive use of force in self-defence. The Law Commission decided (and the Government agreed) that, rather than have a separate defence of excessive force, this should be integrated into the loss of control partial defence, which would accordingly cover cases of *overreaction* to a fear of serious violence, where (i) excessive force is used, and (ii) the attack was not imminent enough to amount to self-

[114] More will be said in this point when looking at the Model Penal Code (MPC) in the Conclusion.
[115] S S M Edwards 'Loss of Self-Control: When his Anger is Worth More Than Her Fear' in Reed and Bohlander (n 90) at 91.

defence.[116] One of the implications of this is that whereas fear is seen as an overreaction, anger is not. This is because the fear trigger accommodates cases where the defendant could not use self-defence because the amount of force used was unreasonably excessive. So, while on the one hand, the fear trigger makes it easier for an abused person to take advantage of the defence, on the other, it fails to appreciate that hers is not an overreaction, and neither is it excessive.[117] On the contrary, and as Reilly has argued, the fear she felt was, for her, an endorsement of the reasonableness of her self-defensive conduct.[118]

Thirdly, fear of serious violence and how it affects a person's behaviour within the context of abuse in particular, is a situation with which the average juror will not be familiar.[119] This makes it even more difficult to fit fear into the loss of control requirement and to compare it with the reaction of a person with a normal degree of tolerance and self-restraint.

4 The Duress Defence[120]

It seems that in England and Wales, there are now two forms of duress - duress by threats, and duress of circumstances. They are both common law defences, but not to murder. This has been the subject of much debate, and much to-ing and fro-ing on the part of the Law Commission,[121] which in 2006 eventually reverted to its original recommendation that duress

[116] LC No. 290 *Report on Partial Defences to Murder* (2004) [4.17], and LC No. 304 *Murder, Manslaughter and Infanticide* [5.53-5]. Emphasis added.
[117] The point is made by Edwards (n 115) 234.
[118] Reilly (n 10) at 141. For further reading on the 'reasonableness of killing' see, for example W Wilson 'The Structure of Criminal Defences' [2005] Crim LR 108, 117: 'Killing, even in justified anger, is the antithesis of reasonableness' and LCCP No. 173 *Partial Defences to Murder* (2003) [4.162]: Provocation 'raises the question whether a reasonable person should ever respond to provocation by killing'.
[119] L Claydon and C Rödiger 'Fear, Loss of Control and Cognitive Neuroscience' (2016) 22 (2) European Journal of Current Legal Issues, or as Loveless writes, one of the fundamental problems is 'general ignorance of the psychological effects of domestic violence' J Loveless 'Domestic Violence, Coercion and Duress' [2010] Crim LR (2) 93, 100.
[120] For a more detailed exposition of this duress section and of some of the points made below, see Williams (n 103) especially 9; 11; 19-20; and 22.
[121] LC Working Paper No.55 *Codification of the Criminal Law. General Principles. Defences of General Application* (1974) [25], recommended that it should be defence to murder. Likewise, in its 1977 *Criminal Law. Report on Defences of General Application* (LC No. 83) [2.42]. LC No.177 *Criminal Law. A Criminal Code for*

should be a full defence to murder (and attempted murder)[122] on a rationale previously expressed, that no 'social purpose is served by requiring the law to prescribe … standards of determination and heroism'[123] that were unattainable. The Government did not take the Law Commission's duress proposals forward in its 2008 Consultation Paper on *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law*; it simply did not look at duress, focusing only on provocation, diminished responsibility, complicity and infanticide.[124]

To satisfy duress by threats, the defendant must demonstrate that he committed the crime as a result of threats of death or grievous bodily harm and that a reasonable person sharing the characteristics of the defendant would have acted as he did.[125] Duress of circumstances provides a defence where the defendant reasonably believes that the *circumstances* are such that unless he or she commits a crime he or she or another will suffer death or serious injury and that 'a sober person of reasonable firmness, sharing the characteristics of the accused [would] have responded ... as [he did]'.[126] Thus it can be seen that '[t]he first limb is concerned with the nature of D's fear and the seriousness of the threat [while] [t]he second involves an evaluation of the reasonableness of response'.[127]

4. 1 Emotions and character(istics) in duress

England and Wales (1989) [12.13] Vol 2 recommended that it NOT be a defence to murder (because of *Howe*). In LCCP No.122 *Legislating the Criminal Code. Offences Against the Person and General Principles* (1992) [18.14], it reverted back to a full defence. It maintained this view in LC No. 218 *Legislating the Criminal Code. Offences Against the Person and General Principles*. Cmnd 2370 (1993) [29.14]. By 2005, in LCCP No. 177 *A New Homicide Act for England and Wales?* [1.42], it was recommending that duress should only reduce first to second degree murder.

[122] LC No. 304 *Murder, Manslaughter and Infanticide* (2006) [6.21].

[123] LC No. 83 *Report on Defences of General Application* (1977) [2.43].

[124] Ministry of Justice CP19/08 'Murder, Manslaughter and Infanticide: Proposals for Reform of the Law*'* (July 2008) [7] and [8].

[125] Herring (n 9) 643. See *R v Graham* [1982] 1 WLR 294 confirmed in *R v Hasan* [2005] UKHL 22.

[126] *R v Martin* [1989] 1 All ER 652 *per* Simon Brown J 654.

[127] Loveless (n 119) 96.

In duress, the relevant characteristic to be taken into account is courage[128]/firmness[129] in the face of threats 'to life and limb'[130] because the overriding mental state of the individual being threatened is fear.[131] As a person who possesses courage is one who is able to overcome fear,[132] the link between fear and courage is thus clearly made,[133] yet this is not attributed to the reasonable man in the objective test at all. Indeed, Duff has contended that the reasonable man should be credited with 'any of this defendant's actual characteristics that affected his response to the threat, *other than characteristics which involve or reveal a lack of … proper courage'*.[134]

There are three problems with this. Firstly, there is an unrealistic assumption that a minimum standard of courage is expected of all individuals.[135] For example, in *R v Horne*[136] and in *R v Bowen*[137] it was held that any emotional characteristics such as vulnerability or susceptibility to threats suffered by the defendant should not be ascribed to the reasonable person nor be taken into account in the objective test. As Virgo has commented, the fact that Bowen's 'low intelligence' and that he was 'more pliable, vulnerable, timid or susceptible to the threats … did not make him less courageous than the reasonable person'.[138] The same could be said of coerced victims of domestic violence highlighted by Loveless. In an argument similar to that propounded by Susan Edwards on loss of control and domestic violence noted earlier,

[128] See for example, G Virgo 'Are the Defences of Provocation, Duress and Self-defence Consistent?' (2002) 4 *Arch News* 4 'the function of this objective test is to impose a test of courage …'
[129] K J M Smith 'Duress and Steadfastness: In Pursuit of the Unintelligible' (1999) 363, 372.
[130] D Pears 'The Anatomy of Courage' Special 'Courage' issue (n 100) 6 and 7.
[131] Spain (n 13) 67, quoting Yeo.
[132] G Kateb 'Courage as a Virtue' in Special 'Courage' issue (n 100) 43. Courage is defined as the 'mental or moral strength to … withstand danger, fear, or difficulty' http://www.merriam-webster.com/ (accessed 6 November 2018).
[133] Pears (n 130) 7.
[134] A Duff 'Choice, Character and Criminal Liability' (1993) 12 (4*)* Law and Philosophy 345, 359. Emphasis added.
[135] See for example, J Gardner 'The Gist of Excuses' (1997-8) 1 Buff Crim LR 575; Berger (n 50); J Dressler 'Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits' in Corrado (n 65) 381.
[136] *R v Horne* [1994] Crim LR 584, 585.
[137] *R v Bowen* [1996] 4 All ER 837, 844.
[138] Virgo (n 128).

Loveless argues that because fear will always be present, it should be acknowledged in the subjective element of the test 'that victims of violence have a greater sensitivity to the risks in their environment than would be obvious to an observer' and that the objective element

> does not accommodate one whose ability to resist a threat is lower than that of a reasonable person … The relevance of this is that an abused woman who has [chosen to remain] with her abusive partner … is likely to be regarded as weak, submissive and vulnerable in the absence of any relevant characteristic.[139]

Secondly, in any event, the standard expected is not simply that of the reasonable man.[140] Rather, it is one of heroism.[141] This can be seen in Lord Coleridge and Lord Hailsham's dicta in *R v Dudley and Stephens*,[142] and in *R v Howe*[143] respectively, to the effect that a reasonable person must heroically sacrifice his life for others. Reilly has criticised Hailsham's judgment because when he decided the defendants were cowards, he took them out of their social context and instead, imposed his own point of view which was that of a war veteran. By doing so, he 'fails to understand that emotion is not a biological phenomenon which can be assessed objectively regardless of the circumstances, but a socially constructed entity specific to a particular context'. On that basis, it was correct that he was criticised as to the

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[139] Loveless (n 119) 98-9. Loveless argues elsewhere that duress should be extended to include coercion in the context of domestic violence; J Loveless 'R v GAC: Battered Woman "Syndromization"' [2014] 9 Crim LR 655, 662.

[140] Defined as an ordinary citizen; 'a hypothetical person in society who exercises average care, skill, and judgment in conduct'. http://legal-dictionary.thefreedictionary.com/Reasonable+Person (accessed 6 November 2018). For more on the reasonable person, see for example, G P Fletcher *Rethinking Criminal Law* (Little, Brown & Co, 1978) 247; V Nourse 'After the Reasonable Man: Getting over the Subjectivity/Objectivity Question' (2008) 11 New Crim LR 33; and P Westen 'Individualizing the Reasonable Person in Criminal Law' (2008) 2 Crim Law and Philosophy 137.

[141] This is a claim made by both R A Duff, 'Virtue, Vice and Criminal Liability: Do We Want an Aristotlian Criminal Law?' (2002-3*)* 6 Buff Crim LR 147 his n 48 and D Pascoe, Thesis (ANU) 'Murder and the Defence of Necessity' (2007) 16 referencing Yeo in 'Necessity under the Griffith Code and the Common Law (1991) 15 Crim LJ 17, 36.

[142] *Per* Lord Coleridge in *R v Dudley and Stephens* (1884) 14 QBD 273 at 287. Criticised by Norrie (n 81) 157.

[143] *R v Howe* [1987] 1 AC 417, 432. See criticism of this by E Colvin 'Ordinary and Reasonable People: The Design of Objective Tests of Criminal Responsibility' (2001) 27 Monash ULR 197, 214.

inappropriateness of comparing people trained to deal with fear with the reasonable person.[144] Such a standard is set too high;[145] is unachievable;[146] and requires people to act contrary to their natural instinct of self-preservation.[147]

Thirdly - and perhaps this is the most logical argument - as the rationale of the duress defence is that it seeks to excuse a perpetrator who gave in to a threat to which others of reasonable fortitude would have done likewise,[148] it must be asked how it can be just to punish a defendant for doing precisely what the reasonable person would have done? Simester and Sullivan have rightly observed that '… there will be occasions when we would expect even a person of reasonable firmness to be coerced into participating in murder …'[149] and as the Law Commission noted in its 2006 Report, '[l]ittle, if any, blame may attach to someone's decision to take part in a killing under duress'.[150] Indeed, the Law Commission quoted Elias J in the case of *R v Hasan* where he stated that defendants acting under duress 'are being punished for giving way to what will often be enormous fear and wholly understandable human frailty'. [151] Indeed, in the same case in the House of Lords, Lord Bingham said that the argument for extending the defence to murder was logically, 'irresistible', while Baroness Hale acknowledged both sides of the duress coin when she said on the one hand that she 'did not understand why the defendant's beliefs and personal characteristics are not morally relevant to whether she could reasonably have been expected to resist' while on the other, she

[144] Reilly (n 10) 148 and 149 and see also J Gardner 'Justifications and Reasons' in A P Simester and A T H Smith (Eds) *Harm and Culpability* (Clarendon Press 1996) 121; and the Special 'Courage' issue (n 100).
[145] A Noti, 'The Uplifted Knife: Morality, Justification and the Choice-of-evils Doctrine' (2003) 78 NYUL Rev 1859, 1886.
[146] F Leverick 'Defending Self-defence' (2007) 27 OJLS 563, 570; Noti *ibid*, 1886.
[147] M Kremnitzer 'Proportionality and the Psychotic Aggressor: Another view' (1983) 18 Israel LR 178, 201.
[148] S M H Yeo 'Proportionality in Criminal Defences' (1988) 12 Crim LJ 211, 219; S H Kadish 'Excusing Crime' (1987) 75 California LR 257, and A Brudner 'A Theory of Necessity' (1987) 7 (3) OJLS 339 are just three who have made this point.
[149] And went on to say that excluding murder and attempted murder from the duress defence is 'too rigid'; Simester and Sullivan (n 17) 805.
[150] LC No. 304 *Murder, Manslaughter and Infanticide* (2006) [1.54].
[151] *ibid* [6.51].

accepted 'that even the person with a knife at her back has a choice of whether or not to do as the knifeman says'.[152]

In these brief quotations, Bingham and Hale identify three of the problematic issues in the duress defence:

(1) Extending the defence to murder;

(2) that characteristics are relevant to the capacity to resist;

(3) that the duressee has a choice of whether to comply with the threat or not.

(1) Baroness Hale picked up on Lord Bingham's comment on extending the duress defence when she noted that the Law Commission had 'sold out to subjectivism' when it recommended in its 2006 Report on *Murder, Manslaughter and Infanticide*, that duress 'should be a full defence to … murder and attempted murder'. At that time, the Law Commission had said it was 'wrong even in respect of murder to condemn the defendant for not acting heroically rather than reasonably …'[153]

In essence, there are two separate points here - subjectivism - and the argument for a full defence. The latter is not the main focus of this article, but one possible bone of contention with the latter is that permitting duress as a full defence to murder would lead to an acquittal, and not, as is the case in the partial defence of loss of control, to a conviction for manslaughter. This would then seemingly give fear - which goes to the very heart of duress[154] - a superior excusatory authority than anger (and fear) in loss of control.[155]

[152] *R v Hasan* [2005] 2 WLR 709 *per* Lord Bingham [21] and *per* Baroness Hale [73].
[153] LC No. 304 *Murder, Manslaughter and Infanticide* (2006) [6.21].
[154] Loveless (n 139) 663.
[155] Reilly (n 10) 146.

Subjectivisation of course, goes to the heart of the objective test, the purpose of which, it has been said, is to specifically 'impose a test of courage'.[156] i.e. the reasonable person is created to epitomize a typical member of society;[157] he/she

> embodies a reasonable level of courage demanded of *all* citizens [and as such] makes no concessions to those who are more "pliant" or susceptible to threats … [There is a] universal expectation … that the law is to be observed. [As Lord Lane said:] it was "a matter of public policy … to limit the defence … by means of an objective criterion formulated in terms of reasonableness".[158]

This means that the law deals with everyone in the same way, even though we are not the same.[159] Some of the reasons for this are that the objective standard 'is *intended* to hold persons up to a desirable standard of conduct' in order to improve their behavior which, as a consequence, also benefits society; that the law cannot take into account all of the quirks from which people suffer; and that it would be hard pressed for the legal system to determine the exact capabilities of every person.[160] The undeniable contrary argument to this is that if the law ascribed all of the defendant's characteristic to the reasonable person, then there would be no point to having an objective test, as it would be totally negated.[161]

An obvious criticism of refusing to admit characteristics is that it is unfair for a person who may be unusually susceptible and who is simply incapable of resisting the threats, to be

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[156] Virgo (n 128).
[157] L Dahan-Katz 'The Implications of Heuristics and Biases. Research on Moral and Legal Responsibility' in Vincent (n 46) 149.
[158] Smith (n 129) 370.
[159] C Bublitz and R Merkel 'Guilty Minds in Washed Brains' in Vincent (n 46) 366. See also N.A.Vincent 'Enhancing Responsibility' in Vincent (n 46) 318.
[160] Dahan-Katz (n 157) 149 and 150.
[161] A slightly different version of this can be seen in Smith (n129) 366.

judged according to the objective standard.[162] Virgo goes on to say that this 'misses the key point. Such a characteristic is not relevant because it contradicts the rationale of the objective test which seeks to determine the boundaries of courage'.[163] As was noted above, this is in fact a standard of heroism which is very often unachievable even by the hypothetical reasonable person.[164]

(2) Virgo's comment refers to defendants who are incapable of resisting the threats. This leads to the second point as expressed by Baroness Hale above - that she did not understand why the defendant's beliefs and personal characteristics are not morally relevant to whether she could reasonably have been expected to resist. The issue with this is that - as will be seen in the neuroscience section below - it is not possible to ascertain whether the perpetrator was indeed not capable of resisting the threat because he was so fear-struck that he/she could not see any choice other than to comply[165] or whether he *was* capable, but chose not to exercise that capacity at the time. If the former, Tadros has argued that where the perpetrator is 'so overwhelmed by fear' and it is clear that he could not achieve a higher standard of courage than he did, then the duress defence should be available. Contrarily, '[i]f an agent has the capacity for courage … but chooses not to act courageously on this occasion … then the defendant has no excuse'.[166] It should be noted at this stage that although neuroscience cannot provide an answer to this conundrum, it is nonetheless known that a person's reaction to fear operates at a conscious and subconscious level.[167] Put together with the fact that fear is

[162] Virgo (n 128).
[163] Virgo *ibid*.
[164] See text to (n 141), and the Law Commission, text to (n 153) above.
[165] Reilly (n 10) 146. What Fischer and Ravizza call 'irresistible fear', J M Fischer and M Ravizza *Responsibility and Control: A Theory of Moral Responsibility* (Cambridge University Press 1998) 82.
[166] Tadros (n 106) 314- 315.
[167] See (n 46) above.

subjective and dependant on the situation, and that its effects will differ as between every individual, it is still documented that 'the ability to control [the fear reaction] is limited'.[168]

(3) Tadros refers to the perpetrators 'choice', as Baroness Hale does when she states that 'even the person with a knife at her back has a choice of whether or not to do as the knifeman says'.

This takes us logically to the difficult third point above - that the duressee has a choice of whether to comply with the threat or not - and to a very brief exposition of choice and character theory which are at odds with each other in the context of duress and to an extent, loss of control also, but which are also relevant to the element of control present in both defences.

As was noted in the introduction, both duress and loss of control are excusatory, rather than justificatory. Traditionally, justification focuses on what the perpetrator did, his choice of action, without taking into account any personal characteristics he possesses, while excuse focuses on the perpetrator's characteristics.[169] i.e. the former is compatible with the choice theory, where individuals are seen as being responsible for their conduct if it is freely chosen, but where such conduct would be excused where it is not.[170] Contrarily, character theory looks to features of the perpetrator's character, the 'fixed or stable aspects of an agent's psychological make-up' and not on whether his behaviour followed the normative paradigm.[171] It would seem therefore that loss of control and duress fit into character theory, as the test for both involves ascription of character, albeit to a limited extent. However,

[168] Claydon and Rödiger (n 119), referring to Damasio and Le Doux's research.
[169] B McSherry 'Criminal Responsibility, "Fleeting" States of Mental Impairment, and the Power of Self-control' (2004) 27 International Journal of Law and Psychiatry 445, 453.
[170] C Finkelstein 'Excuses and Dispositions in Criminal Law' **(**2002) 6 Buffalo Criminal LR Special issue: The New Culpability: Motive, Character and Emotion in Criminal Law 317, 319.
[171] Finkelstein *ibid*, 324. The capacity theory may also be relevant in loss of control insofar as it refers to a person 'who lacks the capacity to restrain his emotions' Finkelstein, 330.

academic discourse has shown that, strangely, choice theory may be appropriate to the duress defence because the perpetrator *does* have a choice, albeit it is a restricted one.[172] If we return to Loveless' exposition on domestic violence and duress, she points out that

> Staying with a violent partner … should not imply freedom of choice or autonomy. Her choices are determined by her duressor … The very real risk is that her response to violence for which she bears no responsibility is likely to be regarded as unreasonable whatever she does. What is socially acceptable "fortitude" in a relationship where violence is endemic and choices curtailed?[173]

Loveless goes on to say that the victim's choices are constrained because she is 'controlled by the duressor'[174] and it is this notion of control which links duress, and indeed loss of control, with the ascription of responsibility because both defences are based on the principle that no one should be criminally liable for crimes committed as a consequence of influences outside of their control.[175]

In law, it is recognised that responsibility relies upon the fact that the perpetrator acts voluntarily and has the freedom or control to choose a course of action. i.e. there is an alternative course of action that is available to him and that he is free to make a choice as which course of action he pursues.[176] In this, he needs to be acting voluntarily because voluntariness is a prerequisite of responsibility. In duress the duressee is not acting

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[172] Simester and Sullivan (n 17) 812. See also Smith's choice account of duress in Smith (n 129).
[173] Loveless (n 119) 100.
[174] *ibid*, 96.
[175] Arenson (n 13) 67, although his focus is on duress and necessity alone. Or, as Levy and Bayne have written, '[c]ontrol is a necessary condition for moral responsibility'; Levy and Bayne (n 104) 465. Or as stated by M Pardo and D Patterson in *Minds, Brains and Law: The Conceptual Foundations of Law and Neuroscience* (Oxford University Press 2013) 37: 'A brain must be "in control" for a human being to make choices. That cannot be disputed'. Or see Fischer and Ravizza (n 165) 17.
[176] Fischer and Ravizza *ibid*, 20.

voluntarily, nor does he have the genuine freedom of choosing a course of action because, in fear of the imposed threat, he is controlled by the duressor.[177] Even if he is responsible, he should not be found to be culpable because he was acting under duress.[178] Similarly, in loss of control, the role of the partial defence reflects the fact that the perpetrator does not completely meet the requirements needed to be held responsible and this includes his capacity to control his behaviour.[179]

However, it is not as straightforward as this because although in both duress and loss of control, the defendant is acting in circumstances engendering significant stress and powerful emotions,[180] in duress, the defendant is expected to try and resist his fear[181] and choose death, while in loss of control (and in provocation, as it then was), where the defendant is angry, he is seen to be *unable* to choose. This has been interpreted as evidence of the disparity in the degree of control expected of a person who is acting out of fear as opposed to one acting out of anger.[182] Thus, as Dressler has elaborated:

> With duress, only Actor's choice-opportunities are reduced. As such, we demand that the unlucky Actor accept his unenviable choices, and make the morally "right" decision … he is capable of making such a decision.
>
> In provocation cases, however … Our common experience informs us that anger affects choice-capabilities, not mere opportunities. Anger makes us less *able* to respond in [an] appropriate fashion.[183]

[177] Loveless (n 139) 663: 'If the threat is, or is believed to be, violent, control will be maintained by fear …'
[178] Fischer and Ravizza (n 165) 83.
[179] K Sifferd 'Translating Scientific Evidence into the Language of the "Folk"' in Vincent (n 46) 186.
[180] Yeo (n 148) 211.
[181] Uniacke (n 28) 111.
[182] See for example, Reilly (n 10).
[183] Dressler (n 12) 463-464. Emphasis in original.

So, the argument is that if the defendant is angry, he is considered to be *incapable* of making a choice, but if he is afraid, he is considered to be *capable* of making a choice. Reilly, points to one of Lord Hailsham's dicta in *Howe*, in which the latter also highlights the division 'between anger under provocation *which is based in affect*, and fear under duress *which is based in cognition*'. As Reilly notes, the consequence of this is that Lord Hailsham recognises that a duressee's cognitive capacity to resist killing is greater in a situation of duress than it is in what was provocation[184] (now loss of control). For Lord Hailsham, the clue for the distinction lies in the difference between *affect* and *cognition*. As was seen earlier, the cognitive view of emotion holds that the actor can assess the importance or significance of events and can himself evaluate the appropriateness of the emotion. This includes fear, but also - according to Kahan and Nussbaum - anger also. However, Lord Hailsham places anger into the noncognitive theory of emotion[185] and to the affectivist approach i.e. that anger in loss of control 'is the result of uncontrollable, biological, physiological and neurological changes within the actor'.[186] Finkelstein agrees with this approach saying that loss of control cases 'at least involve an altered psychological condition' and that as such, the partial defence fits into the capacity theory.[187] It will be recalled that this refers to a perpetrator in loss of control who 'lacks the capacity to restrain his emotions'.[188] Spain in the same vein, also argues that loss of control is 'linked to a mechanistic understanding of emotion'; that is, that anger in particular, is both uncontrollable, and not

[184] Reilly (n 10) 147. Emphasis added.
[185] 'Non-cognitive theories are those that defend the claim that judgments or appraisals are not part of the emotion process. Hence, the disagreement between the cognitive and the non-cognitive positions primarily entails the early part of the emotion process. The concern is what intervenes between the perception of a stimulus and the emotion response. The non-cognitive position is that the emotion response directly follows the perception of a relevant stimulus. Thus, instead of any sort of evaluation or judgment about the stimulus, the early part of the emotion process is thought to be reflex-like'. http://www.iep.utm.edu/emotion/#SH4b (accessed 18 March 2016). This would seem to be akin to the mechanistic theory.
[186] Reilly (n 10) 131.
[187] Finkelstein (n 170) 334.
[188] Finkelstein *ibid*, 330. See (n 170) above.

open to evaluation.[189] On the other side, and agreeing with Kahan and Nussbaum, the Law Commission stated that '[t]he emotion aroused in the provoked contains a *cognitive* component, viz. the belief that the provoked has been wronged by the provoker'.[190]

It would seem then that dividing the two emotions in *this* way does not provide a definitive answer as to why more is expected from the fearful perpetrator in duress than from the angered perpetrator in loss of control. However, perhaps a second dictum from Lord Hailsham in *Howe,* will assist. In addition to the distinction he highlighted between affect and cognition noted above, he also went on to say:

> [p]rovocation … is a concession to human frailty due to the extent that even a reasonable man may, under sufficient provocation temporarily lose his self control [sic] towards the person who has provoked him enough. Duress … is a concession to human frailty in that it allows a reasonable man to make a conscious choice between the reality of the immediate threat and what he may reasonably regard as the lesser of two evils.[191]

This dictum recognises that both defences are a concession to human frailty, but that the basis for that concession is different. In provocation/loss of control it is because it is accepted that a reasonable man *can* lose his self-control. This is simply a given without any further explanation and goes to the question raised earlier in the duress section as to the justness of punishing a defendant for doing what the reasonable person would have done. The difference is, of course that he has a partial defence to murder in loss of control, whereas no defence at

[189] Spain (n 13) 17.
[190] LC No. 290 *Report on Partial Defences to Murder* (2004) [3.39]. Emphasis added.
[191] *R v Howe* [1987] AC 417; see Arenson's very interesting discourse on this (n 13) 70-71.

all is available to the duressee in murder, but if there was, it would result in a complete acquittal.

In contrast and according to Lord Hailsham, the basis of the concession to human frailty in duress is that it allows a reasonable man to make a choice between two evils, one involving his breaking the law and the other some evil to himself or others. The balance between two evils is traditionally perceived as a justificatory notion, and has, in recent years been used to justify 'killing' in the context of necessity,[192] most notably *Re A (Children) (Conjoined twins).*[193] As a rule, however, killing another is not considered to ever be the lesser of two evils,[194] and it must be assumed that this is what Lord Hailsham was rather obtusely referring to. Furthermore, and as has been seen, duress is an excuse and not a justification. Secondly, the criteria for duress does not require a balancing of two evils. Thirdly, the court in *Howe* relied on *R v Dudley and Stephens* as authority for holding that necessity/duress was not a defence to murder, but *Dudley and Stephens* was certainly not decided on the basis of the lesser of two evils; if it had been, the defendants would not have been convicted.

Having said all that, it should be emphasised that Lord Hailsham's dictum regarding the different bases of the concession to human frailty does not in point of fact explain why the perpetrator in duress has a choice, but the perpetrator in loss of control does not. The only possible answer lies in a statement made earlier, that the 'dimension of control' is lower when angry than it is for any other emotion, including fear.[195] Indeed, Holton and Shute, writing before the changes to provocation implemented in the Coroners and Justice Act, wrote that

[192] It has been argued that necessity and duress of circumstances are one and the same. They are not. See, for example, Commentary on R v Jones (Margaret) [2005] QB 259 (CA) by D Ormerod in [2005] Crim LR 122.
[193] *Re A (Children) (Conjoined twins: Surgical Separation)* [2000] 4 All ER 961.
[194] This goes to proportionality, an element of justificatory necessity.
[195] See text to (n 67) above.

anger *extinguishes* self-control.[196] The reason why fear is not perceived in the same way is because very often, people's responses to fear operate at the subconscious level so that there is 'less *conscious* control of their behaviour' when fearful.[197] When this happens, the reaction is instinctive, and tends not to involve a 'conscious thought process'.[198] Although patently treated differently in legal terms, Claydon and Rödiger suggest that responses to both these emotions are 'almost indistinguishable' and that both evidence from medicine and neuroscience suggest that 'there is no scientifically objective measure for the effective separation of anger and fear'.[199] This is not borne out by the descriptions of the two emotions set out earlier.

That neuroscientific study cannot conclusively show changes to the brain which would explain the way in which anger and fear are differently perceived in the law, is unfortunate, but as a relatively recent literature review has shown,[200] other than a brief discourse on capacity to resist, neuroscientific studies have tended to focus more generally on responsibility and determinism. However, that limitation aside, as a relatively new scientific method which *could* provide evidence of whether a legitimate excuse existed or not,[201] neuroscience is relevant here because it can ascertain whether a person has the capacity to make a decision and consequently, if that person can or should be held responsible.[202] It can also 'suggest new ways of looking at both the content and application of our concepts'[203] especially relevant where emotional mental states can lead to an understanding of the reasons

[196] Holton and Shute (n 80).
[197] Le Doux (n 46). Emphasis added.
[198] Claydon and Rödiger (n 119).
[199] Claydon and Rödiger *ibid*.
[200] F X Shen 'Law and Neuroscience' (2016) 48 Ariz St LJ 1043.
[201] S J Morse and W T Newsome 'Criminal Responsibility, Criminal Competence, and Prediction of Criminal Behavior' in S J Morse and A L Roskies (Eds) *A Primer on Criminal Law and Neuroscience* (Oxford University Press 2013) 153 and 155.
[202] See for example, Sifferd (n 179) 185; and Pardo and Patterson (n 175) 134.
[203] A R Mackor 'What can Neurosciences Say About Responsibility?' in Vincent (n 46) 76.

why a person acted as she did i.e. people's behaviour 'cannot be understood if [mental states] are excluded.'[204]

5 The potential impact of neuroscientific study

In the 1990's the term 'neurolaw' was devised as a way of describing the links between law and neuroscience.[205] Similarly, the term 'neurolegalist' has been used to describe researchers who claim that 'scientific data about the brain can illuminate or transform law and legal issues'.[206]

Neuroscientific studies, the relevance of which have, quite rightly, become more evident in law during the last 15 years or so,[207] focus to a large extent on the way in which brain functions determine the way people behave and react, and on whether it can be conclusively proved that our behaviour is predetermined. An examination of the neuroscientific literature however, shows a clear divide between those who, on the one hand advocate determinism and who argue 'that free will is an illusion', that no one is really answerable for his actions[208] and that the criminal law should be changed accordingly.[209] On the other hand there are those who 'hold that given *current* scientific knowledge, there is no need to revise the law and its

[204] Morse and Newsome (n 201) 152.
[205] J Chandler 'Neurolaw and Neuroethics' (2018) 27 CQHE 590 'conclusion'. See text to (n 19).
[206] Pardo and Patterson (n 175) *xxvi*.
[207] See generally M Freeman (Ed) *Law and Neuroscience*. *Current Legal Issues* Vol 13 (Oxford University Press 2011); S Zeki and O Goodenough *Law and the Brain* (Oxford University Press 2006); B Garland (Ed) *Neuroscience and the Law. Brain, Mind and the Scales of Justice* (Dana Press 2004); M Freeman and O R Goodenough (Eds) *Law, Mind and Brain* (Ashgate 2009); and N A Farahany (Ed) *The Impact of Behavioral Sciences on Criminal Law* (Oxford University Press 2009).
[208] Meynen (n 20) 820.
[209] For example, Sapolsky, Greene and Cohen, and Davies. As such, it could be potentially 'destabilizing'; Abrams and Keren (n 11) 2026, and see the scenarios propounded by Sapolsky, and Greene and Cohen in Zeki and Goodenough (n 207).

basic concepts'[210] and because, in any event, '[i]ncreased knowledge about brain chemistry will not answer normative questions about responsibility'.[211]

This then is the first domain where neuroscience could potentially be a useful tool i.e. to assist in the ascription of responsibility.[212] Another issue is the 'outstanding problem',[213] of whether neuroscience can tell us whether a person simply did not have the necessary tolerance or restraint (loss of control) or courage (duress), or whether he did, but chose not to exercise it.[214] A third - linked - issue is one of timing. Looking more closely at the current state of neuroscience and its examination of the effect of characteristic-type emotions on the brain, it would appear that it cannot resolve any of these issues.

As far as the brain is concerned then, the Pre-Frontal Cortex (PFC) is 'considered [to be] the controlling mechanism [which keeps] our emotions in check'.[215] It 'regulates the inhibition of impulses'[216] by sending messages to the limbic system, especially the amygdala.[217] The latter is the section of the brain which governs emotions such as fear and anger.[218] Numerous studies show that damage to the PFC might make it hard for a person to control his conduct[219] and that this, in turn, could lead not only to more impulsive, but also to more violent, behaviour[220] but there is nothing to indicate that this is as a result of an *inability* to exercise

[210] Meynen (n 20) 820. Emphasis added. Such as Morse, Michael Moore and, Pardo and Patterson.
[211] Pardo and Patterson (n 175) 39. Similarly, Mackor (n 203) 57, and Shen (n 200).
[212] See, for example Sifferd (n 179) 184: 'Neuroscience provides substantial new and valuable information for determining criminal responsibility'.
[213] Levy and Bayne (n 104) 468.
[214] See, in relation to duress text to (n 165-167) above.
[215] B J Grey 'Neuroscience and Emotional Harm in Tort' in Freeman (n 207) 214.
[216] W Glannon 'What Neuroscience Can (and Cannot) Tell us About Criminal Responsibility' in Freeman *ibid,* 17.
[217] The 'emotion centre' Grey (n 215) 214. See in particular Le Doux (n 58) 288.
[218] Glannon (n 216) 17; and R M Sapolsky 'The Frontal Cortex and the Criminal Justice System' in Zeki and Goodenough (n 207) 235-8. As noted by Svendsen '… people with damage to the amygdala are unable to feel fear'. Svendsen (n 26) 26.
[219] Glannon *ibid,* 20.
[220] A L Roskies and W Sinnett-Armstrong 'Brain Images as Evidence in the Criminal Law' and M Freeman 'Introduction: Law and the Brain' in Freeman (n 207) 112 and 4-5 respectively.

self-control or simply because of a choice by the actor not to exercise self-control.[221] However, this is not definitive,[222] possibly because some of the studies have been relatively small.

Results of neuroscientific studies to date suggest that it is also not possible to demonstrate that all actions are predetermined.[223] There are essentially four reasons for this: The first is because the majority of studies demonstrate only 'correlations rather than causation'.[224]At the moment, neuroscience simply does not have a way of determining whether a person 'lacked the capacity to refrain from performing a criminal act or had this capacity but failed to exercise it'.[225] Therefore, looking to the 'brain alone does not provide a satisfactory explanation of our actions ...'[226] and there is no conclusive evidence that the brain governs or causes behaviour. In fact, Pardo and Patterson go further than this and opine that '… neuroscience [is limited in that it] cannot tell us where the brain thinks, believes, knows, intends, or makes decisions. People (not brains) think, believe, know, intend and make decisions'.[227]

Linked with this, the second reason is that, irrespective of its cause, any weakness in the capacity to control behaviour does not in itself excuse or mitigate that behaviour. This is because the law is only interested in the actual mental state, and not what caused it.[228]

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[221] Freeman in Freeman *ibid*, 6. Although see Pardo and Patterson (n 175) 123-4 on this point.
[222] Roskies and Sinnett-Armstrong (n 220) 112.
[223] E Aharoni and others 'Can Neurological Evidence Help Courts Assess Criminal Responsibility? Lessons from Law and Neuroscience' (2008) 1124 Annals of the NY Academy of Sciences 145, 147.
[224] Aharoni *ibid* and A L Roskies 'Brain Imaging Techniques' in Morse and Roskies (n 201) 68.
[225] Glannon (n 19) 2.
[226] Glannon *ibid*, 2.
[227] Pardo and Patterson (n 175) 46.
[228] S J Morse 'Lost in Translation? An Essay on Law and Neuroscience' in Freeman (n 207) 531.

Thirdly, it must be remembered that behaviour is subject to the self-evident fact that each individual will respond in a different way to the same emotional stimuli. One reason for this is that emotions are not just natural biological phenomena; rather, they are influenced by the way we have been brought up and educated, and by our experiences; social norms; environment; culture; chance; genetics, heredity[229] and other outside factors.[230] This is why it is so problematic to reconcile emotional reactions with the behaviour of the reasonable person, and to comply with both the objective test[231] and the norms associated with criminal responsibility. Because our brains are able to adapt to external influences, we are not constrained by one set of predetermined outcomes.[232] If this was not so, then no one would be responsible for anything.

The final reason then relates to the notion of legal responsibility. This is a normative paradigm constructed by society, whereby a person's conduct is measured against this hypothetical person of the defendant's sex and age (loss of control) or the sober person of reasonable firmness (duress).[233] It has been said that

> Neuroscience will never find the brain correlate of responsibility, because this is something we ascribe to humans, not to brains … psychiatrists … might be able to tell us what someone's mental state … is without being able to tell us … when someone has too little control to be held responsible. The issue of responsibility … is a social

[229] See, for example, Rosebury (n 70) 39; and C E Izard and E A Youngstrom 'The Activation and Regulation of Fear and Anxiety' in Hope (n 59) 31.
[230] See N A Farahany and J E Coleman JR 'Genetics, Neuroscience and Criminal Responsibility' and B Garland and M S Frankel 'Considering Convergence: A Policy Dialogue about Behavioural Genetics, Neuroscience and Law' in Farahany (n 207).
[231] A Reilly 'Loss of Self-control in Provocation' (1997-8) 21 (6) Crim LJ 320, 326.
[232] M Belcher and A L Roskies 'Neuroscience Basics' in Morse and Roskies (n 201) 34. See also both Vincent in Vincent (n 159) 4 and S J Morse 'Common Criminal Law and Compatibilism' in Vincent (n 46) 39.
[233] Farahany and Coleman (n 230) 240.

> choice … the idea of responsibility is a social construct and exists in the rules of the society.[234]

The final unresolvable issues relates to the 'time machine' problem.[235] In other words, neuroscience is unable to tell us what a defendant's state of mind was at the time the offence was committed, because '[n]euroimaging can take place only after a crime has occurred. It is impossible to study the defendant's brain state at the time of the actual crime (in the past). Therefore, what actually happened at the moment of the crime in a defendant's brain is not directly accessible to neuroimaging findings after the crime'. [236] Put another way, '[t]oday's brain is not yesterday's brain'.[237]

Thus although neuroscience has contributed to the study of emotion by providing new avenues of investigation[238] and different inroads into legal principles and practice, any such inroads will be both rare and uncertain for the conceivable future.[239] As Aharoni concedes, '[n]euroscience is much more limited in the kinds of conclusions it can support than the public, the legal system, and many neuroscientists would like to acknowledge'.[240] Thus, although academics such as Mitchell and Mackay have long argued that more 'effort should … be made … to have regard to what psychologists and psychiatrists have discovered about

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[234] M S Gazzaniga and M S Steven 'Free Will in the Twenty First Century. A Discussion of Neuroscience and the Law in Garland (n 207) 68. Likewise, Aharoni (n 223) 145-6.
[235] H T Greely 'Mind Reading, Neuroscience and the Law' in Morse and Roskies (n 201) 120.
[236] G Meynen 'A Neurolaw Perspective on Psychiatric Assessments of Criminal Responsibility: Decision-making, Mental Disorder, and the Brain' (2013) 36 (2) Int J Law Psychiatry 93, 96-7.
[237] Roskies in Morse and Roskies (n 224) 70. Timing would not, of course, be so relevant where the perpetrator suffered from a permanent mental disorder. A broader and different question would there be whether such a person should be held criminally responsible more generally. I am grateful to the reviewer who raised this point. Notably, most of the research carried out has been on persons with permanent, as opposed to, transient, dysfunctions. See for example, A L Glenn and A Raine 'Ethical Issues' in A L Glenn *Psychopathy: An Introduction to Biological Findings and their Implications* (New York University Press 2016); Morse and Roskies (n 201) 247; Levy and Bayne (n 104); Nestor (n 11) and Meynen *ibid*.
[238] Reilly (n 10) 126.
[239] Morse (n 228) 529.
[240] Aharoni (n 223) 158.

the ways in which emotions affect our mental states and our behaviour'[241] disappointingly, and currently at least, it seems that neuroscience is unable to convey any information that will contest the law as it stands;[242] rather, it is 'simply the most recent candidate … for explaining behavior deterministically … it adds nothing new'.[243]

Conceivably however, in time, neuroscience might develop sufficiently to be able to discover more about a perpetrator's ability to resist, such that there would be evidence to support the use of the defences where an individual can truly show that his characteristics prevented him from being able to resist.[244]

6 Conclusion

More generally, research into emotions, neuroscience and the law since the beginning of the century[245] has made a substantial contribution to the way we think about emotions and the law. For example, Sanger, Bandes and Grossi's research has focused on the role and impact of emotions in the law, in law-making and on people who work in the law.[246] Sanger lists incidents where emotions play a part in our daily activities and gives examples of where emotion has resulted in 'a spate of laws, which are not only motivated by emotion, but include as part of their scheme some emotive component'.[247]

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[241] Mackay and Mitchell (n 46) 49. In contrast, see LC No. 290 *Report on Partial Defences to Murder* (2004) [3.28].
[242] J Greene and J Cohen 'For the Law, Neuroscience Changes Nothing and Everything' in Zeki and Goodenough (n 207) 224.
[243] Morse and Newsome (n 201) 153.
[244] A L Roskies and S J Morse 'Neuroscience and the Law: Looking Forward' in Morse and Roskies (n 201) 247.
[245] Nestor (n 11) 1.
[246] See (n 11) above.
[247] e.g. Megan's law; Sanger (n 11) 110. See also Abrams and Keren (n 11) 2060.

More specifically, it has been seen that the law does recognise that emotions play an essential role in effective and rational decision-making[248] and that anger and fear, the focus of this piece, influence the defendant's reasons for acting[249] and affects their subsequent behaviour, in a different way. It is ironic then, that despite the pervasiveness of fear in these criminal defences its role there remains 'ambivalent'[250] - we have seen that fear has been introduced into the loss of control partial defence, where it does not 'fit,' and where, in any event, it is not given the same priority as anger. Contrarily, it has not been introduced into duress, a defence which does not even acknowledge the fear that a threat engenders, although it is evident that fear affects, and motivates, the way in which an offender responds to the threat, and where it would therefore 'fit.' i.e. fear should specifically be referred to as part of the rationale for the duress defence.

As to loss of control, it has been seen here that anger has a different effect on an actor as compared to fear and as such, the way in which fear has been accommodated in the loss of control partial defence does not do it justice. The partial defence, as its predecessor did before it,[251] still expects individuals to suffer a loss of control. However, although the partial defence is dependent upon a loss of control arising as a result of some emotional turmoil, the emotional turmoil giving rise to the loss of control is not its defining feature: that falls to the necessity to prove an actual loss of control. This does not lie easily with the manifestations of fear.

[248] Damasio (n 30) 40, and Abrams and Keren *ibid,* 2004.
[249] Tadros (n 106) 305.
[250] Reilly (n 10) 121.
[251] *Per* Lord Hoffman in *R v Smith (Morgan)* [2001] 1 AC 146, 173, noted in LCCP No. 173 *Partial Defences to Murder* (2003) [1.40], and *Lowe* [2003] EWCA Crim 677, noted in LC No. 290 *Report on Partial Defences to Murder* (2004) [3.117].

Had the loss of control requirement been abolished, as was recommended by the Law Commission,[252] there would perhaps have been a better opportunity to consider *emotion-based* alternatives as a basis for the defence, such as, for example the provisions on 'extraordinary emergency' referred to in s25 of the Criminal Codes of Queensland and Western Australia (the Griffith Code),[253] or the notion of 'extreme mental or emotional disturbance' as referred to in Clause 210.3. (1) (b) of the Model Penal Code (MPC). The latter provides that:

> [A] homicide which would otherwise be murder [is manslaughter when it] is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

The Law Commission considered this in its 2004 *Report on Partial Defences*, noting that while a number of US states ('reform states') had adopted the clause,[254] some had omitted the 'actor's situation' formulation contained in the second sentence. In line with that, Professor Sanford Kadish in an interesting Report written for the Law Commission advised that the 'actor's situation' formulation should be rejected for a number of reasons, not least because it was not consistent with the rationale of the partial defence.[255] However he commented that 'the EED formulation … is a felicitous and useful improvement over the traditional formulation … [which] hits the nail on the head in asking whether there is reasonable explanation or excuse for the mental disturbance, since in these cases the basis of the

[252] LC No. 290 *Report on Partial Defences to Murder* (2004) [3.115].
[253] See S M H Yeo 'Necessity under the Griffith Code and the Common Law' (1991) 15 Crim LJ 17, and Pascoe (n 141).
[254] LC No. 290 *Report on Partial Defences to Murder* (2004) [3.50].
[255] Appendix F, LC No. 290 *Report on Partial Defences to Murder* (2004) [20 – 23].

mitigation is precisely the emotional disturbance … this part of the MPC proposal has it right'.[256] Despite this endorsement however, the Law Commission ultimately rejected the test as being unduly 'vague and indiscriminate' preferring instead that 'the defendant had legitimate ground to feel seriously wronged by the person at whom his or her conduct was aimed' as the basis of the defence.[257]

As to duress, Eimear Spain has staunchly advocated an emotion-based excusatory duress defence based on a 'reasonable emotional response' whereby the moral quality of the emotion and the individual's response to it could and should be evaluated.[258] According to Spain, the test could be that 'a reasonable person sharing the characteristics of the accused would have experienced fear in the circumstances' i.e. the jury would have to decide 'whether the fear experienced by the defendant (and subsequent action) was morally appropriate'.[259] The same test could be applied to loss of control.[260]

A further alternative incorporating *both* defences (due to their categorisation as excuses) has been advocated by Claire Finkelstein. She opts for what she calls 'rational excuses'. These 'straddle the line between traditional excuses and justifications' neither of which she claims are really appropriate. Rather,

> rational excuses exonerate because they are cases in which the agent acts on the basis of … an "adaptive disposition," namely a disposition that enhances the welfare of the

[256] *ibid* [14]. i.e. omitting the word 'mental' from the formulation, (preferring simply 'extreme emotional disturbance (EED). See Mitchell and MacKay above, text to (n 112).
[257] LC No.290 *Report on Partial Defences to Murder* (2004) [3.59].
[258] Spain (n 13) 264, 268-270. Contrast Nourse who argues against an objective requirement of reasonableness; V Nourse 'Passions's Progress: Modern Law Reform and the Provocation Defence' (1996-7) Yale LJ 1331.
[259] This would be excusatory and not a justificatory/lesser evils defence. Spain *ibid*, 264 and see 272-3.
[260] Albeit different considerations will apply where the fear element has been long-standing; Edwards (n 115) 228.

> agent who cultivates it and makes possible collective welfare improvements. The law is interested in promoting and rewarding such dispositions, because there will be mutual gains from their adoption if members of society generally possess them.[261]

One element of this is the recognition that characteristics *should* be taken into account, although Finkelstein's main point is that, unlike traditional character theory, she argues that the basis of the permitting an excusatory defence is to excuse when the agent acts *'out of character'* rather than acting in character, because the former is 'most chosen', and reflects when he is at his most responsible.[262]

To sum up then, no preference is expressed here as to which option is favoured except to say that firstly, it is recommended that in loss of control, the fear emotion should be more properly incorporated into the defence such that it more effectively includes those whom it was intended to protect, (such as, for example, victims of domestic abuse, but not limited to that class).[263] As it stands, the defence currently makes killing out of anger more defensible than killing out of fear.[264] This wrongly clings to the old (and now defunct) notion of honour from whence the anger derived and upon which the previous partial defence of provocation was based,[265] but it is also noted here that anger is not even specifically named as a trigger in the current defence definition.

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[261] Finkelstein (n 170) 320-321.
[262] Finkelstein *ibid*, 343. Emphasis in original. This is very much like the view expressed by Tadros above at text to (n 106).
[263] See, for example Loveless (n 139) 662.
[264] See for example, Allen (n 15) 241-2.
[265] See (n 9); (n 15); Dressler (n 12); Gough (n 42); and Allen *ibid*.

Secondly, the duress defence should take into account the fear emotion, which is, after all, its key component. As it stands, the defence in its current form is too strict[266] in denying the defence to those who cannot help that they are not courageous or heroic enough. Perhaps it is time to put duress on an equal footing with loss of control, not least on the basis that a person who kills under duress is significantly less blameworthy than one who kills as a result of loss of control. [267]

The recommendations are thus founded on the arguments made here that fear is an appropriate emotion.[268] Both recommendations clearly advocate fear-centered reasoning as a basis for both defences. What part the objective reasonableness element of the defences should continue to play has been briefly questioned.[269] We know that the hypothetical reasonable person is a 'figure constructed to represent a standard member of society'[270] the purpose of whom is to ensure that everyone complies with societal norms, whether they have the capacity to do so or not.[271] Views on this rely on how committed we are to adhering to universal standards of conduct and/or being more open to the more subjective consideration of emotion as recommended here.

[266] Simester and Sullivan (n 17) 805.
[267] Arenson (n 13). He claims that the difference between the two defences presents a 'gross imbalance'; it demonstrates 'an indefensible and strange dichotomy'; it is 'one of the most longstanding and obvious paradoxes in the criminal law' 77, 78 and 74 respectively.
[268] Text to (n 73-81).
[269] Indirectly on pp14-15 for loss of control and more specifically for duress on pp25-26, especially text to (n 161).
[270] Dahan-Katz (n 157) 149. See (n 118); (n 140) and text to (n 156-161) above.
[271] Dahan-Katz *ibid*, 149; Bublitz and Merkel (n 159) 362.